SUPREME COURT NO. 84422-4
COURT OF APPEALS NO. 62700-7-1

SUPREME COURT OF THE
STATE OF WASHINGTON

DONIA TOWNSEND and BOB PEREZ, individually, on behalf of their martial community, and as class representatives; PAUL YSTEBOE and JO ANN YSTEBOE, individually, on behalf of their marital community, and as class representatives; VIVIAN LEHTINEN and TONY LEHTINEN, individually, on behalf of their marital community and on behalf of their minor children, NIKLAS and LAUREN; JON SIGAFOOS and CHRISTA SIGAFOOS, individually, on behalf of their marital community, and on behalf of their minor children, COLTON and HANNAH,

Petitioners,

v.

THE QUADRANT CORPORATION, a Washington corporation; WEYERHAEUSER REAL ESTATE COMPANY, a Washington corporation; and WEYERHAEUSER COMPANY, a Washington corporation,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF

Lory R. Lybeck, WSBA 14222
Brian C. Armstrong, WSBA 31974
Lybeck Murphy, LLP
500 Island Corporation Center
Mercer Island, WA 98040
(206) 230-4255

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Miscellaneous

I. INTRODUCTION AND ISSUES

Petitioners (hereafter "Homeowners" and "Children") respectfully submit this Supplemental Brief in support of their Petition for Review of the Decision of the Court of Appeals, Donia Townsend, et al. v. The Quadrant Corporation, et al., 153 Wn. App. 870, review granted 169 Wn.2d 1021 (September 9, 2010). This case presents three important issues:

1. Whether the Court of Appeals erred when it held that the personal injury claims of nonsignatory, minor children are subject to private, binding arbitration;

2. Whether the Court of Appeals erred by disregarding evidence of the circumstances surrounding the formation of the Purchase and Sale Agreements ("PSAs") containing the arbitration provisions challenged by the Homeowners on procedural unconscionability grounds; and

3. Whether the Court of Appeals erred by announcing a new rule allowing a party to move for summary judgment on the merits without waiving the right to later seek to compel arbitration, if unsuccessful.

The Decision should be reversed because it is inconsistent with Washington substantive law, fundamental rules of contract construction, sound judicial policy, and the Constitutional right to jury trial. It improperly immunizes the integrated arbitration provisions at issue in this case from proper judicial evaluation under Washington law and erroneously compels the Homeowners and their Children to engage in private, binding arbitration where the Children never agreed to arbitrate

and the arbitration clauses are procedurally unconscionable as to the adult Homeowners. This Court should reverse and remand for jury trial.

II. SUPPLEMENTAL ARGUMENT

A. The Decision Erroneously Compelled Nonsignatory Children to Arbitrate Personal Injury Claims.

The plaintiffs in this case include Niklas and Lauren Lehtinen and Colton and Hannah Sigafoos—the minor children of the Homeowners. CP 872, 876; 894, 898. The Children assert personal injury claims arising from the unhealthy conditions in the Quadrant homes purchased by their parents and for defendants' negligence following the delivery of those homes. CP 887-88; 909-10. None of the Children are signatories to the purchase and sale agreements for those homes. CP 178; 640. Some of the Children were not yet even born at the time the PSAs were entered.

1. Nonsignatories Are Generally Not Bound to Arbitrate.

In its Decision, the Court of Appeals acknowledged that the nonsignatory Children have independent tort claims but concluded that their claims are subject to arbitration by operation of the PSAs between their parents and Quadrant. The Court of Appeals reasoned that because "the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of the home", their claims "relate to the PSA" and are therefore subject to arbitration. Decision at 18.

One court day before the Division One panel issued its Decision, this Court confirmed that under Washington law, the general rule is that a nonsignator to an arbitration agreement cannot be compelled to arbitrate. Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 781, 810 (2009). Arbitration is a matter of contract and a party cannot be required to submit to arbitration to resolve any dispute that he has not otherwise specifically agreed to submit to arbitration. Id. According to Satomi, Washington law recognizes only two limited exceptions to the general rule that a nonsignator to an arbitration agreement cannot be compelled to arbitrate. Id. A nonsignatory can be bound (1) where his or her claims are asserted solely on behalf of a signatory to the arbitration agreement; or (2) when ordinary contract and agency principles apply (such as incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel). Id. & n. 22. Neither exception applies here.

2. The Decision Erroneously Relied on an Out-of-Jurisdiction, Trial Court Ruling to Compel Nonsignatories to Arbitrate.

The Court of Appeals' Decision neither mentions nor applies any of the limited exceptions to the general rule that nonsignatories cannot be compelled to arbitrate. Rather, the Court of Appeals appears to have adopted the analysis of the New York federal district court in Trimper v. Terminix Int'l Co., 82 F.Supp.2d 1 (N.D.N.Y 2000). There, the court held

that the tort claims of the plaintiffs' children were subject to arbitration under the terms of the service agreement authorizing Terminix's application of insecticide at the plaintiffs' residence. Finding that the "the source of the duty of care that was allegedly breached and gave rise to the tort claim arises from the service contract", the court reasoned that, "the tort claim here does not fall beyond the scope of the contractual relationship" because "[t]here can have been no breach [of the service contract] without negligence [in the course of the performance of the contract work]." Trimper, 82 F.Supp.2d at 4-5.

3. The Decision is Contrary to *Satomi* and Washington Contract Law.

The Court of Appeals' analysis has no applicability following Satomi. In Satomi, the condo association was bound to the arbitration provision in the agreement between the condo owners and the developer because the association brought the owners' claims in a representative capacity and it had "not alleged damage to any property in which it has a protectable interest." Satomi, 167 Wn.2d at 812. In other words, the association was bound to arbitrate because it merely prosecuted the owners' claims as its agent. In this case, the children's claims are not being brought by their parents in an agency capacity. CP 232-52; 253-73.

The Children are named plaintiffs with their own, independent claims for bodily injury. CP 236, 257; 887-88; 909-10.

In Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919 (2010), the Court of Appeals correctly applied Satomi to hold that the wrongful death claims of the nonsignatory heirs of the decedent were not subject to the arbitration provision in the decedent's contract with a nursing home. The court distinguished the survival action, which merely preserved the causes of action the decedent would have had if he had lived, with the wrongful death claims, which are independent claims of the family members for their exclusive benefit. Woodall, 155 Wn. App. at 930-32. The Children's injury claims in this case are similarly distinct causes of action pursued exclusively for their benefit and to compensate them for their own injuries. Just as no benefits of a wrongful death claim flow to the estate of the decedent, the Children's injury claims do not inure to the benefit of their parents. And just as the wrongful death claims never belonged to the decedent, the Children's personal injury claims never belonged to their parents. See Woodall, 155 Wn. App. at 932.

No ordinary contract or agency principles, such as incorporation by reference, assumption, agency, veil-piercing/alter ego, or estoppel apply either. The Children's claims are separate and distinct from their parents' claims and are in no way "related" to the PSAs in a manner that would

justify compelling these nonsignatories to private, binding arbitration. As the Fifth Circuit Court of Appeals correctly explained in a case involving personal injury claims of nonsignatory children damaged by formaldehyde in the homes purchased by their parents, "[n]one of these theories would require children to arbitrate simply because they are minors and their claims are related to those of their parents." Fleetwood Enterprises, Inc. v. Gaskamp, 280 F.3d 1069, 1076 (2002). The same holds true here.

The Trimper analysis adopted by the Court of Appeals is inconsistent with Washington law because the relevant inquiry is not whether the claims "relate" to the contract in some attenuated manner, but whether the nonsignatories base their "right to sue on the contract itself". Powell v. Sphere Drake Ins. P.L.C., 97 Wn. App. 890, 896 (1999) (emphasis added), quoting Aasma v. American S.S. Owners Mut. Protection and Indem. Ass'n., 95 F.3d 400 (6th Cir. 1996). While the Decision acknowledged this rule, it conspicuously omitted the word "itself" and as a result failed to apply the rule correctly. Decision at 17.

In Powell, the Court of Appeals held that a plaintiff who had been injured on a marine vessel could not be compelled to arbitrate his CPA and fraudulent conveyance claims against his employer's insurer based on the policy's arbitration clause. Examining the nature of the plaintiff's claims, the court concluded that they were not subject to arbitration because they

were "statutory claims that are separate from the insurance contract itself." Powell, 97 Wn. App. at 894-95. As the court explained, "the respective claims are based on Sphere Drake's alleged violations of certain statues well after it insured the judgment debtor. The claims do not arise merely because Sphere Drake insured that judgment debtor." Id., at 895.

The Children's claims similarly do not arise simply because their parents contracted to purchase Quadrant-built homes. The Children's injury claims are not based on the PSAs. They are based on Quadrant's failure to warn of and disclose problems and dangers known to exist in its homes and the failure to investigate, remediate, and decontaminate—breaches occurring well after the PSAs were executed and the homes were delivered. CP 247-48; 268-69. The Children's claims are not contractual—they sound in tort. Id. The Children do not attempt to enforce the terms of the PSAs, nor do they base their claims on any alleged warranty contained in them. CP 232-52; 253-73. None of the causes of action asserted by the Homeowners, or the Children, rely on or arise from any of the terms of the PSAs. Id.

The Children have a constitutional right to a jury trial of their personal injury claims "that shall remain inviolate". Wash. Const., art. I, § 21; Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 365 (1980). The Court of Appeals' Decision strips them of this right simply because their parents

purchased homes that later caused injury. This decision is inconsistent with Satomi and Washington law and should be reversed.

B. The Decision Erroneously Precludes Proper Judicial Consideration of the Homeowners' Procedural Unconscionability Claims Under Washington Law.

The Decision should also be reversed because it erroneously refused to consider relevant evidence of procedural unconscionability submitted by the Homeowners to challenge the arbitration provisions contained within the PSAs.

Under Washington law, procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction, including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. Satomi, supra at 814. Procedural unconscionability relates "to impropriety during the process of forming a contract". Nelson v. McGoldrick, 127 Wn.2d 124, 131 (1995).

In their complaints, the Homeowners assert a cause of action to invalidate arbitration provisions of the PSAs on unconscionability grounds CP 251; 272; 297. In response to Quadrant's motion to compel arbitration, the Homeowners argued that arbitration provisions themselves (not the PSAs) are procedurally unconscionable. CP 83; 87-90; 122-26;

691-96; 711. The Homeowners offered evidence of both the procedural unconscionability of the arbitration provisions (CP 132-33; 139-40; 673-74; 679-80) and the questionable circumstances surrounding the formation of the PSAs, including

- Testimony that Quadrant instructed the Homeowners the terms of the PSAs were "not negotiable" and that they had to agree to all of the terms (including the arbitration clause) in order to purchase a Quadrant home. [CP 133-34; 140; 674; 680-81]

- Testimony that Homeowners were denied the opportunity to read, review, and question the terms of the PSAs before signing them. [CP 133-34; 140; 674-75; 680-81]

- Testimony that Homeowners were only shown an electronic version of the PSA displayed on a computer screen at the Quadrant representatives' desks and were not given a hard copy to read, ask questions about, mark-up, or take for review. [CP 132-33; 140]

- Testimony that Quadrant's sales representatives failed to discuss the terms and provisions of the PSAs. [CP 140]

- Testimony that the Homeowners were subjected to high pressure sales tactics, including being instructed that they had to agree immediately (during the initial sales appointment) to purchase a home on Quadrant's terms [CP 133-34; 140; 673-74; 680-81] and that if they did not agree, they would lose the chance to purchase a home altogether. [CP 133; 674; 681]

- Testimony that Quadrant "created a sense of extreme urgency and rushed us through the execution [of the PSA] process" and informed a Homeowner that if she "hesitated" to agree to all of the terms of the PSA during the initial sales appointment, Quadrant would bump her to the end of the sales list and raise the price of the home by $5,000 to $10,000. [CP 674]

- Testimony that "Quadrant's representative explained that if we did not sign a purchase and sale agreement that day, she expected that

Quadrant would increase the purchase price of the home a minimum of $5,000 each month that we waited." [CP 134]

- Testimony that the Homeowners were not provided with copies of the PSAs even after being pressured to execute them. [CP 134; 674; 681] In one instance, the Homeowners did not receive a copy of the signed agreement until 11 days after executing it. [CP 134]

Although the Court of Appeals acknowledged that the "Homeowners specifically challenged the arbitration clause[s] for procedural unconscionability", it declined to consider this evidence on the basis that it "relate[s] to the PSA as a whole". Decision at 15.

1. The Decision Misapplied *Prima Paint*.

The panel refused to consider this evidence based on the United States Supreme Court's decision in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). In that case, the claimant did not challenge the arbitration provision of the contract, but instead claimed that the contract as a whole was fraudulently induced, rendering the arbitration provision unenforceable. Id., at 398-400. The Court held that the Federal Arbitration Act does not permit a court to consider claims of fraud in the inducement of the contract, and that such challenges are reserved for the arbitrator to decide. Id., at 403-04.

The U.S. Supreme Court later applied a similar analysis in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). There, the plaintiff also did not challenge the arbitration clause, but instead

claimed that the contract itself was void *ab initio* by virtue of its usurious finance charges. Id., at 444. Applying Prima Paint, the Buckeye Court held that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Id., at 445-46.

This Court addressed the limited applicability of the Prima Paint/Buckeye analysis in McKee v. AT&T Corp., 164 Wn.2d 372, 394 (2008). There, McKee challenged the enforceability of an arbitration provision contained within his Consumer Services Agreement on procedural unconscionability grounds. McKee, 164 Wn.2d at 378-81.

Distinguishing Buckeye, this Court explained that "when the validity of the arbitration agreement itself is at issue, the courts must first determine whether there was a valid agreement to arbitrate." McKee, 164 Wn.2d at 394 (emphasis added). This Court further explained that this rule applied because McKee (like the Homeowners) challenged only the unconscionability of the arbitration clause. Id.; CP 251; 272; 297; CP 83; 87-90; 122-26; 251; 272; 297; 691-96; 711. The McKee Court then analyzed evidence relating to the formation of the Consumer Services Agreement, including evidence that McKee was not given a copy, was not allowed to review it or agree to its terms, or acknowledge his acceptance. McKee, 164 Wn.2d at 401-02. Based on the analysis of the evidence

surrounding the formation of the Agreement itself, this Court concluded, "[t]hese facts raise an issue of whether McKee had a reasonable opportunity to understand the terms and a meaningful choice." Id., at 402.

This Court employed a similar analysis in Satomi Owners Association v. Satomi, LLC, 167 Wn.2d 781 (2009). In Satomi, condominium owners challenged the enforceability of an arbitration provision contained within a warranty addendum agreement on the basis that it was procedurally unconscionable. Id., at 789, 814. The challenge to the arbitration provision consisted solely of a claim that the warranty addendum agreement itself was a contract of adhesion. Id, at 814. Again, this Court considered evidence relating to the formation of the contract to determine whether its arbitration clause was procedurally unconscionable:

> Blakeley Association merely claims that the warranty addendum is an adhesion contract. It fails to even argue the aforementioned factors relating to whether the unit purchasers had a meaningful choice. Therefore, we hold that Blakeley Association has failed to meet its burden of showing the warranty addendum is procedurally unconscionable.

Satomi, 167 Wn.2d at 815.

McKee and Satomi demonstrate that where there is a challenge to an integrated arbitration clause, the court, not an arbitrator, must evaluate evidence of contract formation when determining whether an arbitration provision is procedurally unconscionable. This is the only approach

consistent with Washington law, which requires consideration of all of the circumstances surrounding the transaction to determine if there has been impropriety in the formation of the agreement. McKee, 164 Wn.2d at 401-02; Satomi, 167 Wn.2d at 814; Nelson, 127 Wn.2d at 131. This is also the only logical approach, as evidence of impropriety surrounding the formation of a contract necessarily bears upon the enforceability of the contested arbitration provision contained within it.

2. Courts and Scholars Agree Evidence of Contract Formation Must Be Considered By a Court.

Sitting *en banc*, the Ninth Circuit reached the same conclusion in Nagrampa v. Mail Coups, Inc., 469 F.3d 1257 (9th Cir. 2006). There, the court held that the district court erred by failing to consider evidence related to the formation of the contract offered in support of Nagrampa's procedural unconscionability challenge to its arbitration provision:

> When the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable . . . The federal courts cannot shirk their statutory obligation to do so simply because controlling substantive state law requires the court to consider, in the course of analyzing the validity of the arbitration provision, the circumstances surrounding the making of the entire agreement.

Nagrampa, 469 F.3d at 1264 (footnote omitted). In reaching its logical, well-reasoned decision, the Ninth Circuit analyzed numerous federal appellate court decisions demonstrating that it is both appropriate and

necessary for a court to consider evidence of impropriety surrounding contract formation when deciding whether its arbitration provision is procedurally unconscionable. See Nagrampa, 469 F.3d at 1271-75.

Legal commentators agree that Prima Paint does not preclude judicial consideration of evidence of contract formation when evaluating a procedural unconscionability challenge to an arbitration clause:

> [O]ne has to make some arguments that apply to the circumstances of the formation of the contract as a whole, even if the target is just the arbitration clause. This type of inquiry was not thought to conflict with *Prima Paint*'s admonition that the court can consider only challenges that implicate the validity of the arbitration clause. Indeed, since an unconscionability analysis will almost always include some matters that involve the contract as a whole—namely its adhesionary formation—such a reading of *Prima Paint* would mean that practically all of the many courts to have ruled on unconscionability had over-stepped their jurisdiction. That could not possibly be correct.[1]

As other commentators explain, misapplication of the Prima Paint rule significantly weakens the safeguard afforded consumers (like the Homeowners) by the doctrine of procedural unconscionability by deferring judicial consideration of a procedural unconscionability challenge to an integrated arbitration clause to the award enforcement stage, where the scope of review is extremely limited:

> [T]he practical effect of the cases . . . which defer most unconscionability challenges to the award-enforcement stage, is to significantly dilute the unconscionability safeguard in the

[1] Prof. Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging And The Evolution Of Federal Arbitration Law, 83 N.Y.U. L. REV. 1420, at 1481 (2008).

> mandatory arbitration context. It weakens an important protection for consumers, franchisees, and employees against one-sided arbitration agreements. Since arbitral awards have been subject to extremely deferential review at the award-enforcement stage, it is unlikely that post-award review will have the same effect . . . in terms of policing arbitration clauses for unfairness. Another consequence is that, in the mandatory arbitration context, deferring judicial review makes it more likely that a consumer or employee may be forced to endure the costs of an arbitration proceeding, even if it turns out that the arbitration clause was unconscionable. Deferring judicial review makes it more difficult for the weaker party to challenge a one-sided clause, and therefore enhances the potential for abuse of mandatory arbitration clauses.[2]

The Court of Appeals' failure to consider evidence regarding the formation of the PSAs as part of the Homeowners' challenge to the arbitration clauses precludes proper judicial review of the procedural unconscionability question under Washington law. As Prima Paint counsels, arbitration agreements are "as enforceable as other contracts, but not more so" and that "to immunize an arbitration agreement from judicial challenge . . . would be to elevate it over other forms of contract" in contravention of Section 2 of the FAA. Prima Paint, 388 U.S. at 404 n. 12. The Court of Appeals' analysis immunizes integrated arbitration clauses from proper judicial review by removing important evidence from the court's consideration. This Court should confirm that Washington law requires a court to consider evidence surrounding formation of a contract

[2] Prof. Karen Halvorson Cross, Letting the Arbitrator Decide Unconscionability Challenges, Ohio State Journal On Dispute Resolution, Vol. 26, *Forthcoming* at 76 (citation omitted) (available at www.ssrn.com, abstract id = 1552966).

containing an arbitration clause when a party seeks to invalidate that clause alone on grounds of procedural unconscionability.

C. WRECO and Weyerhaeuser Waived Any Right to Arbitrate By Moving For Summary Judgment on the Merits.

The Court of Appeals acknowledged that under Washington law "[a] party may waive the right to arbitrate by moving for summary judgment." Decision at 18, citing Naches Valley Sch. Dist. No. JT3 v. Cruzen, 54 Wn. App. 388, 395-96 (1989). The Court of Appeals declined to apply this rule, however, reasoning that WRECO and Weyerhaeuser's motion for summary judgment was based not on the "merits", but rather, whether they were "proper parties". Decision at 19.

This Court should reject the analysis employed by the Court of Appeals and confirm that under Washington law, a party waives its right to arbitrate by moving for summary judgment on the merits. The application of this well-reasoned rule is consistent with the record and important policies discouraging forum shopping.

1. Defendants' Litigation On the Merits Waived Arbitration Under Washington Law and the Weight of Authority.

As established in the record, WRECO and Weyerhaeuser moved for summary judgment on the merits. The motion relied on matters outside the pleadings (including declarations) to argue defendants had no connection

to the Homeowners or their defective homes and specifically contended that the Homeowners lacked evidence supporting the *prima facie* elements of each cause of action. CP 792-95; 802-05; 34-35; 60-61; CP 797-800. This was a motion on the merits that waived any right to arbitrate.

In Naches Valley, the Court of Appeals properly found waiver of the right to arbitrate because the filing of a motion for summary judgment "indicates an intent . . . to proceed with the action rather than seek arbitration." Naches Valley, 54 Wn. App. at 396. This analysis is consistent with the weight of well-reasoned authority and better comports with the policies favoring arbitration and disfavoring forum shopping. Indeed, numerous decisions of federal and state appellate courts hold that moving for summary judgment waives any right to arbitrate based on these important considerations.

In Kahn v. Parsons Global Servs., Ltd., 521 F.3d 421, 428 (D.C. Cir. 2008), the D.C. Circuit held that moving for summary judgment on the merits is inconsistent with any claimed right to arbitrate and effectively waives such a right. As the court explained,

> [W]here, as here, a party moves for summary judgment through a motion including or referring to 'matters outside the pleading', that party has made a decision to take advantage of the judicial system and should not be able thereafter to seek compelled arbitration. A less rigorous approach to summary judgment based on materials outside the pleadings would encourage parties to attempt repeat litigation of merits issues not resolved to their satisfaction,

> undermining the 'policy that arbitration may not be used as a strategy to manipulate the legal process.'

Kahn, 521 F.3d at 427 (internal citations omitted), quoting National Foundation For Cancer Research, v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 776 (D.C. Cir. 1987). Other courts similarly hold that moving for summary judgment is a substantial invocation of litigation and waives any right to later seek arbitration.[3]

Washington law does not require a showing of prejudice in order to find that a party waived its right to demand arbitration. Lake Washington School Dist. No. 414 v. Mobile Modules Northwest, Inc., 28 Wn. App. 59, 62 (1981). But even courts requiring prejudice in this context acknowledge that a motion for summary judgment, in view of the time and expense associated with such litigation activity, "could not have caused anything but substantial prejudice to the [plaintiffs]." Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1162 (5th Cir. 1986); accord Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 224 (3d Cir. 2007).

[3] See e.g., Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc., 754 F.2d 457 (2nd Cir. 1985); St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F.2d 585 (7th Cir. 1982); Ritzel Communications Inc. v. Mid-American Cellular Telephone Co., 989 F.2d 966, 969-70 (8th Cir. 1993); Good Samaritan Coffee Co. v. LaRue Distributing, Inc., 275 Neb. 674, 686 (Neb. 2008); Lapidus v. Arlen Beach Condo. Assoc., Inc., 394 So.2d 1102, 1103 (Fla. Ct. App. 1981); Applicolor, Inc. v. Surface Combustion Corp., 77 Ill.App.2d 260 (1966).

2. The Decision Is Contrary to the Policy Against Forum Shopping and Policies Favoring Arbitration As a Non-Judicial Process.

This Court should also confirm that under Washington law a party waives any right to arbitrate by first moving for summary judgment on the merits because the Court of Appeals' Decision to the contrary implicates the strong judicial policy against forum shopping and is inconsistent with the policies favoring arbitration as an alternative, non-judicial forum to resolve disputes. As other courts have correctly observed,

> Submitting a case to the district court for decision is not consistent with a desire to arbitrate. A party may not normally submit a claim for resolution in one forum and then, when it is disappointed with the result in that forum, seek another forum.

St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc., 969 F.2d 585, 589 (7th Cir. 1982). Other courts agree:

> [F]or purposes of a waiver of an arbitration agreement[,] prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.

Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 346 (5th Cir. 2004) (punctuation omitted).[4]

[4] Accord, In re Tyco, 422 F.3d 31, 46 n. 5 (1st Cir. 2005); In re Citigroup, Inc., 376 F.3d 23, 28 (1st Cir. 2004); Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 327 (5th Cir. 1999); PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 107 (2d Cir. 1997); Doctor's Assocs. v. Distajo, 107 F.3d 126, 134 (2d Cir. 1997); Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991); Good Samaritan Coffee Co. v. LaRue Distributing, Inc., 275 Neb. 674, 686 (Neb. 2008).

Allowing a party to litigate the merits on summary judgment and later arbitrate the same claims or defenses also undermines the fundamental policies behind arbitration. As this Court has explained, "[t]he very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned." Barnett v. Hicks, 119 Wn.2d 151, 160 (1992) (noting the object of arbitration is to avoid the formalities, delay, expense and vexation of ordinary litigation). Arbitration "is designed to settle controversies, not serve as a prelude to litigation." Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 402 (1989).

This Court should reverse the Court of Appeals and confirm that under Washington law, a party waives any right to arbitrate by first moving for summary judgment on the merits.

III. CONCLUSION

For all of the reasons set forth above, the Homeowners and the Children respectfully request that this Court reverse the Decision and remand for jury trial.

Respectfully submitted this 22nd day of November, 2010

LYBECK MURPHY, LLP

By: /s/ Brian C. Armstrong
Lory R. Lybeck (WSBA #14222)
Brian C. Armstrong (WSBA #31974)
Counsel for Petitioners

PROOF OF SERVICE

I, Brian C. Armstrong, declare that I caused to be filed with the clerk of the Supreme Court, the foregoing PETITIONERS' SUPPLEMENTAL BRIEF via email (and copied to counsel of record listed below via email). I also served a copy of the same on counsel of record by legal messenger on the date set forth above.

Michael Scott
Laurie Lootens Chyz
Counsel for Respondents Quadrant, WRECO, and Weyerhaeuser
Hillis Clark Martin & Peterson PS
1221 Second Ave., Suite 500
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 22nd day of November, 2010.

/s/ Brian C. Armstrong
Brian C. Armstrong (WSBA #31974)
Counsel for Petitioners